SUPREME COURT, U. S.
OCT 31 1973
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-720

EDWARD WARNER AND ELIZABETH WARNER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on June 25, 1973.

OPINIONS BELOW.

The order of the Circuit Court of Appeals is not officially reported, but it is printed in Appendix A hereto, *infra.*

The opinion of the United States Tax Court is reported at 56 T. C. 1126 and is printed in Appendix B hereto, *infra.*

JURISDICTION.

The order of the Circuit Court of Appeals was entered on June 25, 1973. The petition for rehearing and suggestion for rehearing en banc was ordered denied on August 6, 1973. Juris-

diction of this Court to review this order by writ of certiorari is conferred by 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

The questions presented herein arise under Section 1033 of the Internal Revenue Code of 1954, as amended, and raise extremely important issues as to the correct legal standard to be applied to determine whether property has been involuntarily converted as a result of "condemnation or threat or imminence thereof" within the meaning of Section 1033 so as to entitle the gain resulting therefrom to nonrecognition under Section 1033.

These questions have not been decided by this Court, and their resolution will have a far reaching financial impact not only upon the instant petitioners, against whom an income tax deficiency for their tax year 1965 in the amount of $80,566.78, exclusive of statutory interest thereon, has been erroneously affirmed by the Court of Appeals, but upon all other taxpayers whose property becomes a target for acquisition by any governmental or other entity having the power of condemnation.

The United States Tax Court held that there was no threat or imminence of condemnation at the time the petitioners sold their property[1] as a result of the negotiations of Theodore R. Tucker, the senior state park land acquisition man, with the Warners, because the Tax Court specifically found as a fact that Mr. Warner "was informed by Tucker that the funding difficulties and limitations on the State's ability to proceed definitely precluded any possibility of condemnation." (Appendix 10).[2] The Court of Appeals held that the evidence did not support

1. "Their property" or phrases of similar import herein shall be deemed to refer only to the petitioners' Potts, Ward and Hedlund tracts, and *not* to the two Chase tracts and the Eldridge tract.

2. Hereinafter, the "Appendices" to this petiton shall be abbreviated as "App." The pagination thereof is from A1 to 29, inclusive.

this finding of fact, which was the key finding of fact upon which the Tax Court's decision adverse to the Warners was based. Nonetheless, the Court of Appeals affirmed the Tax Court's ultimate holding that Mr. Tucker's negotiations with Mr. Warner did not constitute a threat or imminence of condemnation. The Court of Appeals gave as its reason for so holding the fact that Mr. Tucker told Mr. Warner that the State "could" condemn, rather than that the State "would" condemn, his property for use as a State park.

The questions presented are:

1. Is the existence of a "threat or imminence" of condemnation within the meaning of Section 1033 of the Internal Revenue Code of 1954, as amended, automatically precluded despite the totality of the factual situation present and despite the taxpayer being advised by an agent of an entity having the power of condemnation that his property "could" be condemned, unless the taxpayer is advised by such agent that his property "would" be condemned? The Court of Appeals held that the use of the word "could" rather than "would" automatically prevented Mr. Tucker's negotiations with Mr. Warner from giving rise to a reasonable inference on Mr. Warner's part that the condemnation of his land was threatened or imminent.

2. If the existence of a "threat or imminence" of condemnation within the meaning of Section 1033 of the Internal Revenue Code of 1954, as amended, is to be determined by reference to the totality of the factual situation, rather than by reference solely to whether or not the phrase "would be condemned" rather than "could be condemned" is used by an agent of an entity having the power of condemnation in his negotiations with a taxpayer, does the application of this test for determining the existence of a "threat or imminence" of condemnation to the factual situation in the instant case require the reversal of the Court of Appeals' order affirming the Tax Court's decision adverse to the petitioners?

STATUTE INVOLVED.

The statute involved is Section 1033 of the Internal Revenue Code of 1954, as amended. The relevant text of Section 1033 is set forth as Appendix C hereto, *infra.*

STATEMENT OF THE CASE.

Edward Warner and his wife, Elizabeth Warner, acquired the following tracts of land in Van Buren County, Michigan, on the dates indicated:

Description of Real Estate	Date of Acquisition
Potts (150 acres)	April 1960
Hedlund (4 acres)	November 1961
Ward (7 acres)	September 1961

Prior to and during 1964, Mr. Warner had been interested in acquiring the following properties which were located in the same vicinity: Chase (5 acres), Eldridge (13 acres) and Chase (12 acres).

In January, 1964, the Van Buren County road commission and the Michigan state legislature decided to locate a park in Van Buren County. In February, 1964, at a meeting attended by various state senators and representatives as well as department and township officials, the county road commission agreed to continue its efforts to acquire the Drake property located in Van Buren County on Lake Michigan immediately adjacent on the north to the Ward tract owned by Mr. Warner. The county road commission indicated that it would be able to fund a purchase of the Drake tract from the Drake estate in terms of $125,000.00. State representatives agreed that up to $100,000.00 in State funds would be available to augment the Drake tract, which was regarded as the hard core portion of the proposed park. On July 1, 1964, the Michigan legislature provided an appropriation of $10,000.00 for the purpose of taking options for the purchase of additional property for the proposed State park. This proposed park was to extend from just north

of the Drake property down through the Ward, Masterson, Peters, Chase, Hedlund, Eldridge and Potts properties to a point just south of the Potts' tract. Van Buren County commenced negotiations for the purchase of the Drake property sometime in February 1964. Its purchase of the Drake tract was consummated in January 1965.

Mr. T. R. Tucker, who was the senior park land acquisition man of the Michigan Department of Conservation during 1964, contacted Mr. Warner in early February 1964 regarding the proposed park. During the period from February to November 1964, Mr. Tucker met with Mr. Warner several times and also talked with him several times on the telephone in connection with the sale of his property. Mr. Tucker offered to purchase Mr. Warner's Ward tract, which was the State's prime interest, for $75,000.00 or $80,000.00, and he also advised Mr. Warner of the State's interest in acquiring the Potts and Hedlund tracts as well as the two Chase tracts and the Eldridge tract. Mr. Warner rejected Mr. Tucker's offer of $75,000.00 or $80,000.00 for the Ward tract, and advised Mr. Tucker that he would only sell the Potts, Ward and Hedlund tracts for a price of $600,000.00. In the course of these negotiations, condemnation was discussed, and Mr. Tucker informed Mr. Warner of the State's extreme reluctance to exercise its power of condemnation. He also indicated to Mr. Warner that there was a limitation on the funds available for the proposed park.

On April 16, 1964, the following article appeared in the News-Palladium, a newspaper published in Benton Harbor, Michigan, as the page one headline story:

NEW STATE PARK FOR AREA!

* * * *

613 Acres Of Lake Dunes In Van Buren
Winter And Summer Use Is Planned

* * * *

Complete Project To Take 10 Years, Cost $3,500,000

* * * * * * *

SOUTH HAVEN—Plans to develop a 613-acre state park in uninhabited Lake Michigan sand dune country five miles south of here were unveiled today in a joint announcement by the Michigan Department of Conservation, the Van Buren County Board of Supervisors and the Van Buren County Road Commission.

The year-round recreation park is expected to be completed in about 10 years with an estimated investment of state and county funds totaling $3,500,000.

The site straddles the South Haven-Covert township line and is a mile and a half north of the Covert interchange on I-196. It includes one and four-tenths miles of Lake Michigan beach.

Agreements to purchase portions of the park site have been adopted by the conservation department and the county board of supervisors. Cost of acquiring the desired property fronting on Lake Michigan has been estimated at $500,000, according to Ivan Stein of rural South Haven, Van Buren road commission chairman.

DELAYED ANNOUNCEMENT

Van Buren supervisors voted to purchase 197 acres of property comprising the northern part of the proposed park during the Tuesday board meeting. Announcement was held up until county officials completed negotiations yesterday to purchase the 197 acres from the estate of the late Harry L. Drake of Chicago.

The joint announcement said financial plans call for eventual purchase of the county's share by the state. Then the Department of Conservation would take over administration of the area as a state park.

Tentative plans by the state include spending about three million dollars for development of recreation area over a ten-year period.

YEAR-AROUND USE

Designed for year-around use, the park will include 7,500 feet of beach for swimming, camp sites and picnic areas along the scenic dunes, paved parking areas and winter ski and toboggan slopes with vertical drops of more than 190 feet.

Paul Kaiser, engineer-manager of the Van Buren road commission, told supervisors earlier this week the park eventually will have about 2,000 campsites and will accommodate up to 30,000 persons per day when completed.

State Sen. Frederic Hilbert of Wayland, chairman of the Senate's conservation committee, has been involved in much of the park program negotiations at the state level.

He said "The park will make a significant contribution to the economy of southwestern Michigan. It will serve upwards of one and a half million visitors a year. In addition to bringing in more tourist dollars, it will provide the people living in this part of the state with another excellent opportunity to enjoy outdoor recreation in their own back yard."

The 197-acre Drake estate plus another 22 acres considered for purchase by the county and more than 80 acres acquired by Van Buren county in the past 24 years through tax reversion sales, will be joined on the south by about 300 acres to be acquired by the state.

Idea 29 Years Old

Arthur Elmer, head of the conservation department's parks division, said negotiations now are under way on several tracts of land. He said a request that money be appropriated to secure the options will go to the Legislature next year.

Announcement of plans to developed [sic] the park brought to reality an idea which originated 29 years ago.

A master park plan was drawn in 1935 to develop 2,700 acres as a joint project of the National Park Service and the Michigan Conservation Department. But state funds to cover the $127,000 cost were not available and the project was terminated.

Van Buren supervisors revived the possibility of a recreation area in 1940 and in the interim, the county has acquired small parcels of property in Rosevelt Hills and Hiawatha Hills subdivisions through tax reversion sales.

PARK STUDY MADE

In 1962, the board directed the county road commission to assure [sic] statutory duties as county park trustees for the purpose of studying feasibility of a major park development.

The study was begun and a preliminary report made. But Van Buren county was removed from distressed area classification before the federal government project could be undertaken.

In September, 1962, State Rep. Edson V. Root, Jr., of Bangor brought the Legislature's interim park study committee to tour the site together with Stein, State Sen. Hilbert and Kaiser. A favorable committee report was delivered.

The road commission continued its study through the summer of 1963 with cooperation of board of supervisors and officials of South Haven city and township and Covert township. Last November, preliminary negotiations were begun with major property owners.

REIMBURSE COUNTY

Realizing the ultimate potential of the county recreation area, road commission officials conferred with Root and Hilbert and eventually the state-county venture was proposed. Elmer and other conservation department officials inspected the site and further meetings led to the development of the present financing plan.

As additional finances become available to the conservation department, the county will be reimbursed for its expenditures and title to the land then will be transferred to the state.

The conservation department will plan the development of the recreation area. (Record 69-70).[3]

Both an aerial photograph and a map of the land involved appeared on page one of the newspaper along with this article,

3. This reference to the Record is to the Joint Appendix of the parties filed with the Court of Appeals and certified and transmitted to this Court by the Clerk of the Court of Appeals.

and Mr. Warner's Ward, Hedlund and Potts tracts, together with the Eldridge and two Chase tracts, were clearly shown as being squarely within the proposed park boundaries.

The text accompanying the aerial photograph read as follows:

> VAN BUREN COUNTY STATE PARK FROM THE AIR:
>
> Broken line outlines approximate boundaries of 613-acre state park to be developed on Lake Michigan sand dunes in South Haven and Covert townships. It extends from I-196 expressway west to shoreline. Former US-31 curving through site will be converted to an access road. At lower left corner is Palisades Park beach and cluster of cottages.

The text accompanying the map read as follows:

> SITE OF PLANNED PARK:
>
> Shaded area of map locates site of year-round recreation area to be developed jontly by Van Buren County and State Conservation Department as a state park. It is about five miles south of South Haven and a mile and a half north of I-196 Covert interchange.

This newspaper article was seen by Mr. Warner one or two days after it appeared.

Unknown to Mr. Warner, his land in Van Buren county was also within the boundaries of a proposed generating site for Consumers Power Company, a public utility, as a result of its decision in late November 1964 to acquire land in Van Buren county for use as a site for a generating plant. Since Consumers Power Company desired to keep its interest in acquiring property in Van Buren county a secret, it hired an agent, Mr. Gerald Derks, who was to acquire all property for it under a contract expressly requiring him to keep its identity confidential.

On December 10, 1964, Mr. Derks acquired an option to purchase the Masterson tract, which was situated approximately

in the center of the proposed plant site and was in the vicinity of the property owned by Mr. Warner. Commencing in mid-December 1964 and continuing for a period of approximately one month, a drilling rig was located on the Masterson tract and soil samples were extracted by an independent contractor on behalf of Consumers Power Company.

Mr. Derks initially contacted Mr. Warner during the first week in December 1964. In the course of his negotiations with Mr. Warner, Mr. Derks advised him that Mr. Masterson had already agreed to sell his property to Mr. Derks. At the conclusion of these negotiations, Mr. Warner agreed to sell his property, executing agreements with Mr. Derks on December 29, 1964, for the sale of the Potts tract for $350,000.00 and on January 5, 1965, for the sale of the Hedlund, Ward, Eldridge, and two Chase tracts for $120,000.00. Since Mr. Warner did not own the two Chase tracts and the Eldridge tract on that date, it was agreed that he would obtain title to such tracts prior to the closing, and that if he were unable to do so, the purchase price would be reduced by $2,000.00 per acre for each acre he was unable to convey. The closings on the sales took place on July 6, 1965. Consumers Power Company did not publicly reveal its interest in the real estate acquired by Mr. Derks until June 1965, when it issued a news release regarding this matter.

Mr. Derks did not become aware of the State of Michigan's interest in the property in question for use as a State park until early December 1964, when he was advised of the proposed State park by either Mr. Warner or Mr. Masterson. Upon advising Consumers Power Company of this fact in late December 1964, Mr. Derks was instructed to contact the Michigan Department of Conservation to see if an arrangement could be worked out to permit both the State park and the generating plant project to continue and coexist in that same general area. Mr. Derks initially contacted the Michigan Department of

Conservation in January of 1965 regarding his undisclosed principal's interest in acquiring the same land which they were seeking to acquire. Thereafter, the park boundaries were changed to reduce the size of the park and in the spring of 1965, an exchange agreement was worked out between Derks and the State of Michigan with respect to which land would be used for the generating site and which land would be used for the State park. Inasmuch as Mr. Tucker learned as a result of these negotiations with Mr. Derks that Mr. Warner had contracted to sell his land, Mr. Tucker made no further contact with Mr. Warner. Pursuant to the exchange agreement, Consumers Power Company made the Ward tract available to the State for park use in the summer of 1965.

On their federal income tax return for 1965, the Warners reported the sale of their property as an involuntary conversion and recognized gain only to the extent that the proceeds of such sale were not properly reinvested in other property similar or related in service or use to the property so converted. The Commissioner of Internal Revenue refused to accord nonrecognition treatment to the gain on such sale and required that the entire amount of such gain be recognized.

The Warners contested the Commissioner's deficiency determination by filing a petition with the Tax Court. The Tax Court held that the Warners were not entitled to nonrecognition treatment under Section 1033, basing its ultimate finding that there was no threat or imminence of condemnation at the time the Warners sold the property upon its specific finding of fact that Mr. Warner "was informed by Tucker that the funding difficulties and limitations on the State's ability to proceed definitely precluded any possibility of condemnation." In view of such finding of fact, the Tax Court stated that the facts of the instant case presented "at the most a remote possibility of condemnation." Consequently, a deficiency in income taxes for the tax year 1965 in the amount of $80,566.78, exclusive of

statutory interest, was determined against the Warners by the Tax Court.

Upon appeal, the United States Court of Appeals for the Seventh Circuit entered a four page order affirming the Tax Court's decision, despite having found the aforementioned key finding of fact upon which the Tax Court decision was based to be erroneous.

The Commissioner's statutory notice of deficiency was dated January 22, 1969, and the Tax Court petition was filed on April 14, 1969. Jurisdiction was obtained in the United States Tax Court under Sections 7442 and 6211 through 6214 of the Internal Revenue Code of 1954, as amended, and Section 272 of the Internal Revenue Code of 1939, as amended.

REASONS FOR GRANTING WRIT.

The order of the Court of Appeals should be reviewed because it passed upon extremely important questions as to the correct legal standard to be applied to determine whether property has been involuntarily converted as a result of "condemnation or threat or imminence thereof" within the meaning of Section 1033 of the Internal Revenue Code of 1954, as amended, to entitle the gain resulting therefrom to the nonrecognition treatment provided by Section 1033.[4] These questions, which have not yet been decided by this Court, were decided by the Court of Appeals contrary to existing case law.

If the Court of Appeals' resolution of these questions is allowed to stand, a disastrous financial blow will be sustained

4. Section 1033 provides that the gain realized as a result of an involuntary conversion is not recognized for purposes of taxation to the extent that the proceeds of such involuntary conversion are reinvested within the applicable time period specified in Section 1033 in other property similar or related in service or use to the property so converted. Thus, by providing such nonrecogniton treatment, Section 1033 permits the recognition of gain realized as the result of an involuntary conversion to be deferred until such time as the property into which the proceeds of such involuntary conversion are reinvested is disposed of by the taxpayer.

not only by the instant petitioners against whom an income tax deficiency for their tax year 1965 in the amount of $80,566.87, exclusive of statutory interest, has been erroneously affirmed by the Court of Appeals, but also by many other taxpayers whose property becomes a target for acquisition by an entity having the power of condemnation. In addition, if the unduly rigorous legal standard for determining the existence of a "threat or imminence" of condemnation erroneously embodied in the order of the Court of Appeals is not corrected, taxpayers whose property is designated for acquisition by an entity having the power of condemnation may be well advised to require condemnation proceedings to be filed against them in order to ensure that they will be accorded the nonrecognition treatment provided by Section 1033. This, of course, would further increase the number of suits presently clogging state and federal court dockets in many areas of the country.

1. Despite deleting the Tax Court's finding of fact which served as the keystone supporting the Tax Court's decision disallowing the Warners' nonrecognition of gain under Section 1033 on the sale of their property, the order of the Court of Appeals dated June 25, 1973, nonetheless affirmed the Tax Court's decision as a result of its misapprehension of the correct legal standard to be applied. In light of the Court of Appeals' deletion of the Tax Court's key finding of fact, the application of the correct legal standard to the factual situation in this case required the reversal of the order affirming the Tax Court's decision. The Court of Appeals' failure, then, to reverse the Tax Court's decision proceeded from a failure to perceive:

(1) The significance of its deletion of the finding of fact which was the keystone supporting the Tax Court's decision; and

(2) The subjective nature of the test of reasonableness which constitutes the correct legal standard for determining the existence of a "threat or imminence" of condemnation.

Before both the Tax Court and the Court of Appeals, the Warners contended that an independent threat or imminence of condemnation arose as the result of the negotiations of Theodore R. Tucker, the senior state park land acquisition man, with the Warners, in the context of the entire factual situation. However, the Tax Court held that a threat or imminence of condemnation was not created by Mr. Tucker's negotiations with Mr. Warner, despite the totality of the factual situation, because it specifically found as a fact that Mr. Warner "was informed by Tucker that the funding difficulties and limitations on the State's ability to proceed definitely precluded any possibility of condemnation." The Court of Appeals, however, in its above referenced order held that the Tax Court erred in making the above quoted finding of fact on which the Tax Court's ultimate holding adverse to the Warners was based. Nonetheless, the Court of Appeals affirmed the Tax Court's ultimate holding that Mr. Tucker's negotiations with Mr. Warner did not constitute a threat or imminence of condemnation.

That the above quoted finding of fact is the keystone upon which the Tax Court's ultimate adverse holding is based, and without which such ultimate holding cannot be supported, is made crystal clear by the following portion of the Tax Court's opinion:

> We have recently held, as petitioner points out, that section 1033 does not require that the possibility of condemnation be reduced to a certainty, noting that "any reasonable construction of the word [threat] must recognize the possibility that the impending, undesirable consequence may never occur." *S. & B. Realty Co., supra,* at 870. This language, however, in no way implies that the remote possibility of condemnation is sufficient to constitute a threat or imminence thereof. ***The facts of the instant case present at the most a remote possibility of condemnation in that Tucker, speaking as agent for the State of Michigan, informed petitioner that its limited funding situation precluded the possibility of condemnation.*** We agree with petitioner that the fact that Tucker did not tell petitioner

> that his property would without a doubt be condemned if agreement were not reached on a price for the sale of that property should not in and of itself be construed as precluding the existence of a threat or imminence of condemnation. ***However, not only did Tucker not tell petitioner that his property would be condemned, but he stated to him that his property would not be condemned in view of the State's funding problems.*** Therefore, it is clear to us that the compulsion under which the taxpayers acted in ***S. & B. Realty Co., supra,*** and ***Frank O. Maixner,*** 33 T. C. 191 (1959), is lacking here.[6] Since petitioner did not have actual notice of, nor could he *reasonably* infer from the events which occurred, any undesirable, impending consequence, there could be no compelling reason for him to convert his property into cash. Cf. ***S. & B. Realty Co., supra,*** and ***Frank O. Maixner, supra.*** Accordingly, we hold that there was no threat or imminence of condemnation at the time petitioner sold the property in question,[7] and therefore petitioners are not entitled to nonrecognition treatment under section 1033. (App. 24-25) (Emphasis added.)

In responding to the Warners' contention that the Tax Court erred in finding that Mr. Tucker had told Mr. Warner that condemnation by the state was definitely precluded, the Court of Appeals agreed that the Tax Court had erred in making such finding of fact, and it stated its holding on this point as follows:

> The Warners argue that the Tax Court clearly erred in finding that Tucker had told them that condemnation by the State would not occur. In support of its holding, the Tax Court placed prime reliance on the following testimony from Tucker:
>
> Q. Was condemnation mentioned in your negotiations with Mr. Warner?
>
> A. At any time?
>
> Q. Yes.
>
> A. Yes, the subject was brought up by Mr. Warner. We find clients always have an interest in what our inherent powers are and the extreme reluctance of the Department of Conservation and the

> limited history of condemnation is always brought to the fore at this point. In my twenty-five years with this division it had less than four cases. This is always brought out, and the funding difficulties and situations and limitations on our ability to proceed definitely precluded any possibility of condemnation.
>
> *We must agree that this statement fails to support the finding of the Tax Court.* The Government cites additional testimony of Tucker to the effect that he informed the Warners of funding difficulties in connection with the proposed park, but it cannot seriously be contended that statements of this sort bear more than remotely on the possibility that Tucker discussed his inability to condemn with the Warners. (App. 2-3) (Emphasis added.)

However, despite deleting the key finding of fact upon which the Tax Court's ultimate holding adverse to the Warners was based, and despite the fact that the Commission did not dispute in his Answer Brief the Warners' contention made in their Appeal Brief that the deletion of such key finding of fact would require the reversal of the Tax Court's utimate holding on the issue of the existence of a threat or imminence of condemnation, the Court of Appeals nonetheless affirmed the Tax Court's ultimate holding, stating its rationale for so doing as follows:

> "Be that as it may, Mr. Warner himself testified:
>
> Q. Did he [Tucker] discuss condemnation with you?
>
> A. The first time that I met him?
>
> Q. At any time.
>
> A. No, he didn't.
>
> Q. I'm not referring to the first time.
>
> A. No, he knew, we both understood that the Park had the right, we knew the Park, he told me or I told him that I knew the Park had a right to condemn.
>
> Q. Then you did discuss condemnation?
>
> A. Yes, we did discuss it. *He didn't say he was going to condemn me, but I knew they could.* (Emphasis supplied.)

> We find this admission by Warner more than sufficient to support the ultimate holding of the Tax Court that Warner's dealings with Tucker gave rise to no *reasonable* inference on Warner's part that the condemnation of his land was threatened or imminent."[5] (App. 3-4) (Emphasis added.)

The Court of Appeals' misapprehension of the legal standard to be applied to the factual situation to determine whether a threat or imminence of condemnation was present is highlighted in the above quoted portion of the Court of Appeals' order. Despite both Mr. Tucker and Mr. Warner testifying that the fact that the State could condemn the Warners' property was

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5. In the original copy of the order of the Court of Appeals dated June 25, 1973, which counsel for the petitioners received by mail on Tuesday, June 26, 1973, this sentence read as follows:

> "We find this admission by Warner more than sufficient to support the ultimate holding of the Tax Court that Warners' dealings with Tucker gave rise to no reasonable inference on Warners' part that the condemnation of his land was *threatened as imminent.*" (Emphasis added.)

On Monday, July 9, 1973, the petitioners filed in the office of the Clerk of the Court of Appeals a petition for rehearing and suggestion for rehearing en banc. Among the arguments made in support of a rehearing was that the Court of Appeals, in requiring that condemnation be "threatened *as* imminent", was imposing a standard which was in direct conflict with the express wording of Section 1033, which is worded in the disjunctive so as to require only that condemnation be "threatened *or* imminent". See *S. & B. Realty Corp.*, 54 T. C. 863, 870 n. 6 (1970). On Thursday, July 12, 1973, counsel for the petitioners received by mail a copy of the Court of Appeals' order dated June 25, 1973, with the word "CORRECTED" stamped on each of the order's four pages, with the sole change being that the phrase "threatened *as* imminent" appearing in the footnoted sentence was changed to "threatened *or* imminent." The date on which such "correction" was made does not appear on such corrected order, nor it is entered on the Court of Appeals' docket sheet for this case. By such "correction", the Court of Appeals merely cured its obvious misstatement of the correct legal standard to be applied. However, it did not thereby cure its misapplication of that legal standard to the resulting factual situation, or its misapprehension of that legal standard which resulted in its order that the use of the phrase "*could* condemn" rather than "*would* condemn" precluded the existence of a threat or imminence of condemnation.

discussed in the course of their negotiations, as is clearly shown by those portions of the transcript quoted in the order, the Court of Appeals seized upon Mr. Warner's admission that Mr. Tucker "didn't say he was going to condemn me, but I knew they could" as justification for its affirmance of the Tax Court's ultimate holding. Thus, the Court of Appeals effectively ruled that the fact that Mr. Tucker only advised Mr. Warner that the state *could* condemn his property, rather than that the state *would* condemn his property, precluded the existence of a threat or imminence of condemnation.

As concerns the Court of Appeals' apparent imposition of a requirement that a taxpayer such as Mr. Warner be told by an agent of an entity having the power of condemnation that his property "would" be condemned, as a prerequisite for entitlement to the nonrecognition treatment provided by Section 1033, the Tax Court itself recognized that the use of the word "would" as opposed to "could" is not required by the standard of "reasonableness" applied in *Frank O. Maixner*, 33 T. C. 191 (1959), *acq.* 1963-2 C. B. 5 (1963), and *S. & B. Realty Co.*, 54 T. C. 863, *acq.* 1970-2 C. B. xxi (1970). The Tax Court stated in its opinion that:

> "We agree with petitioner that the fact that Tucker did not tell petitioner that his property would without a doubt be condemned if agreement were not reached on a price for the sale of that property should not in and of itself be construed as precluding the existence of a threat or imminence of condemnation." (App. 24)

This quotation from the Tax Court's opinion accurately states the existing case law on this point, which requires that the entire factual situation be analyzed, inasmuch as the Tax Court previously ruled in *Maixner*, which was a consolidated case involving two separate petitioners, Maixner and Kubicek, that Kubicek was entitled to the nonrecognition treatment provided by Section 1033 when he sold his gravel deposits after being advised by a state highway engineer that "they *could* condemn

the land and take the gravel." (33 T. C. at 194) (Emphasis added.)

Since the order of the Court of Appeals was entered under Rule 28[6] of the Rules of the Seventh Circuit, it is apparent that the Court of Appeals did not intend to establish a more stringent standard for entitlement to the nonrecognition treatment provided by Section 1033. If the Court of Appeals had so intended, it undoubtedly would have issued an opinion rather than an order and would have cited authorities and given reasons in support of the adoption of that more stringent standard which it applied. Thus, it seems quite clear that its adoption and application of that more stringent standard is the result of its misapprehension of the applicable standard in the very important respect discussed above.

Although the Court of Appeals did misapprehend the standard of "reasonableness" to be applied, it did acknowledge that the standard of "reasonableness" itself is to be applied for purposes of determining whether the Warners are entitled to the nonrecognition treatment provided by Section 1033. The "reasonableness" test was first formulated in *Maixner*, where

6. Circuit Rule 28 was promulgated pursuant to resolution of the Judicial Conference of the United States and is intended to reduce the proliferation of published opinions. The relevant portions of this rule are as follows:

"The Court may dispose of an appeal (1) by an order or (2) by an opinion, which may be signed or per curiam.

Orders shall not be published and opinions shall be published.

* * * * *

Unpublished orders:

* * * * *

(2) May be in writing and contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(a) are not frivolous but

(b) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance."

the Tax Court substituted for the rigid objective criteria set forth in Rev. Rul. 58-557 a test of "reasonableness": That is, whether it was reasonable for the petitioners to infer from the totality of the factual situation that their property was being subjected to a "threat or imminence" of condemnation. In *Maixner*, the Tax Court stated:

> "We have no doubt that Sandman's statements to petitioners were taken by them to mean that if they did not enter into the agreements proposed by him, the gravel deposits would be condemned. It is clear that their execution of the agreements was the result. Since Sandman was a highway engineer supervising purchases of road materials and since it was apparent from his conduct in negotiating for the acquisition of such materials, and the procuring of agreements therefor, that he was representing the State Highway Commission, *it was reasonable* for petitioners to infer that he spoke with sufficient authority to make it likely that his threats could and would be carried out if petitioners did not execute the agreements he presented. We think that a realistic construction of the statute in this respect requires no more. In the same vein, it is our view that Rev. Rul. 58-557 (1958-2 C. B. 402) is too restrictive in the requirements therein set forth. (33 T. C. at 195.) (Emphasis added.)

Although the Internal Revenue Service, in response to the *Maixner* case, issued Rev. Rul. 63-221, which modified Rev. Rul. 58-557 and implemented a portion, but not all, of the *Maixner* holding, the Tax Court was not deterred by the Internal Revenue Service's failure to fully implement the holding of the *Maixner* case. Consequently, the Tax Court applied and amplified the *Maixner* doctrine in *S. & B. Realty Co.*, where the Tax Court stated:

> "As a relief provision, section 1033 is to be liberally construed. John Richard Corp., 46 T. C. 41, 44 (1966). In addition, it is well established that the words of revenue acts should, where possible, be interpreted in their ordinary, everyday senses. *Malat* v. *Riddell*, 383 U. S. 569, 571

> [17 AFTR 2d 6044 (1966)]. With these guides in mind we must determine whether there were facts in the instant case sufficient to constitute a threat.
>
> There was certainly 'an indication of something impending,' which was undesirable. Webster's *Third New International Dictionary* (1961 Ed.) (definition of threat). In our opinion, had it not been for this sword of Damocles petitioner would not have sold his property.
>
> It is significant that the word 'threat' was used in section 1033. This is indicative of the fact that the statute does not require that the possibility of condemnation be reduced to a certainty. Any *reasonable* construction of the word must recognize the possibility that the impending, undesirable consequence may never occur. The crucial factor is that the petitioner was compelled by this impending consequence to take evasive action." (54 T. C. at 870.) (Emphasis added.)

The Tax Court, in its opinion in the instant case, reaffirmed its prior holdings in *S. & B. Realty Co.*, and *S. H. Kress & Co.*, 40 T. C. 142 (1963), that a party who is under a threat or imminence of condemnation may sell his property to a person other than the one who has created such threat or imminence and still come within the purview of Section 1033. The Tax Court also acknowledged the validity of the "test of reasonableness" established in the *Maixner* case, and the principles announced in the *S. & B. Realty Co.* case, stating that the standard to be applied was whether:

> "any *reasonable* man would construe the events transpiring during 1964 and during the year at issue as signifying that the State was going to acquire petitioner's property for purposes of devoting it to use as a state park and that he would not be permitted to retain possession of it." (App. 24) (Emphasis added.)

The Tax Court, referring specifically to the *S. & B. Realty Co.* and *Maixner* cases, also restated such standard as being that unless Mr. Warner could "reasonably infer from the events

which occurred, any undesirable, impending consequence, there could be no compelling reason for him to convert his property into cash." (App. 25) (Emphasis added.)

The subjective nature of the test of reasonableness is further emphasized by the following statement in *Ervin J. Stone*, 32 T. C. M. 94, 1973 P-H T. C. Memo ¶ 73,026 (1973), a case in which a threat or imminence of condemnation was not found to be present primarily because condemnation was precluded by there being insufficient time for successfully bringing condemnation proceedings prior to the federal funding deadline for obtaining a site for the construction of a hospital:

> "[T]he existence of a threat of condemnation is to be judged from the seller's point of view by taking into account all of the facts and circumstances known to the seller at the time of the sale. *Edward Warner*, 56 T. C. 1126 (1971), appeal pending C. A. 7, December 30, 1971; *Frank O. Maixner*, 33 T. C. 191 (1959). The test to be employed is whether the seller reasonably believed that something undesirable would happen if he refused to sell his land. *S. & B. Realty Co.*, 54 T. C. 863 (1970)."

Thus, it is clear that the Court of Appeals' holding that the use of the phrase "could condemn" rather than "would condemn" precluded the existence of a threat or imminence of condemnation violates this test of reasonableness, which requires that reference be had to the entire factual situation, not just to a single element thereof. Therefore, the Court of Appeals' order is contrary to existing case law and for the reasons set forth above, should not be allowed to stand by this Court.

2. As is apparent from a reading of the Tax Court's opinion, its ultimate holding that a threat or imminence of condemnation was not constituted by Mr. Tucker's negotiations with Mr. Warner, in the context of the entire factual situation, was based upon its finding of fact that the Court of Appeals has held to be erroneous: That Mr. Tucker had informed Mr.

Warner that any possibility of condemnation was definitely precluded. Inasmuch as the Tax Court expressly recognized the presence of a remote possibility of condemnation notwithstanding the presence of the finding of fact now found to be erroneous by the Court of Appeals, it is apparent that the Court of Appeals' deletion of such finding of fact should have resulted in a reversal of the Tax Court's ultimate holding if the Court of Appeals had properly applied the correct legal standard, as it is simply not viable under the applicable standard in the absence of such finding of fact.

Since the test of reasonableness requires that the entire factual situation be taken into account to determine whether it was reasonable for Mr. Warner to conclude that his property was being subjected to a threat or imminence of condemnation, such a review is in order. Consequently, it should be noted that the Tax Court made the following findings of fact, which were not disturbed by the Court of Appeals:

(1) "During the period [from] February to November, 1964, Tucker met with petitioner several times and also talked with him several times on the telephone in connection with the sale of his property." (App. 9)

(2) "Tucker offered to purchase petitioner's Ward property, which was the State's prime interest, for $75,000.00 or $80,000.00." (App. 10)

(3) "If funds were available, the State was also interested in the Potts and Hedlund properties . . ." (App. 10)

(4) Mr. Warner had advised Mr. Tucker that his price for the Potts, Ward and Hedlund properties was approximately $600,000.00, a price which Mr. Tucker believed was too high. (App. 9-10)

(5) The park boundaries, which included all of the petitioner's property, as originally conceived, were not changed to reduce the size of the park until sometime in January, 1965, after the State learned of Consumers Power Company's interest

in the land in that area, and after the Warners had entered into the agreements with Mr. Derks for the sale of their property. (App. 8-9, 14)

(6) With regard to the front page headlined newspaper article which appeared in the April 16, 1964, issue of the News-Palladium of Benton Harbor, Michigan, "an aerial photograph and map of the land involved in the proposed park appeared in the newspaper along with the article. The Ward, Hedlund, Potts, Eldridge and two Chase tracts all appeared within the proposed park boundaries. Petitioner saw this newspaper article one or two days after it appeared." (App. 12)

(7) Prior to the Warners' entry into the agreements for the sale of their property to Mr. Derks, the Masterson property, which was situated approximately in the center of the proposed plant site and was in the vicinity of the Warners' property, was optioned to Mr. Derks and a drilling rig was placed on such property and soil samples were taken by drilling, and the Warners were aware of these facts. (App. 13-14)

In addition, Mr. Tucker testified that he had also made numerous contacts with Messrs. Peters and Masterson, who owned property within the boundaries of the proposed state park and in the vicinity of the Warners' property, concerning acquiring such properties for use as a State park, and Mr. Tucker further testified that he did not give up on attempting to acquire the Warners' property, and the Ward tract in particular, until after he learned of the sale of the property to Mr. Derks. (Record 146, 141, 143, 147.)

The importance of the newspaper article itself to the overall factual situation cannot be overemphasized. It was the page one headline story and was accompanied by a map and an aerial photograph showing the Warners' property as being within the boundaries of the park. It stated that "the year-round recreation park is expected to be completed in about *10 years* with an estimated investment of state and county funds totaling $3,500,000"; that "announcement was held up until county officials

completed negotiations *yesterday* to purchase the 197 acres from the estate of the late Harry L. Drake of Chicago," which tract is immediately adjacent to the Ward tract on the north; that "a request that money be appropriated to secure the options will go to the Legislature *next* year;" and that three governmental entities would be involved to varying degrees in the acquisition and development of the park land: The Michigan Department of Conservation, the Van Buren County Board of Supervisors and the Van Buren Road Commission. (Record 69-70.) (Emphasis added.)

The full impact of this newspaper article upon persons such as the Warners owning property within the park's proposed boundaries can only be begun to be appreciated by reading the article in its entirety. (See Exhibit 12 at Record 69-70.) In view of the newspaper article's announcements, and the remainder of the factual situation, it is understandable that the Warners believed that it was inevitable that their land was going to be acquired for park purposes, with such acquisition ultimately being made by condemnation if they did not agree to sell their land. No evidence was presented by the Commissioner to indicate that any subsequent newspaper article stating that the park project was not to proceed as indicated in that article was ever published to lessen in any way that article's sense of the inevitability and finality of a park being established on the land located within the described boundaries. Likewise, Mr. Tucker did not testify that he ever advised Mr. Warner that the park project was not to proceed as indicated in that article.

The only findings of fact which might initially appear to be in conflict with the remainder of the factual situation are that Mr. Tucker advised Mr. Warner of "funding difficulties" and "the State's extreme reluctance to exercise its power of condemnation and its limited history of condemnation." However, this initial appearance is dispelled by a more detailed consideration of such findings. Mr. Tucker ineptly explained this nebulous "funding difficulty" as consisting only of the replacement of a $100,000 purchase program with a $10,000 option program, but

did not testify as to any ceiling on the total purchase prices to be set forth in those options which required the later appropriation by the State Legislature of the funds required to complete the purchases pursuant to those options. More importantly, it is certainly understandable that Mr. Tucker would allege funding difficulties in the hopes that it would cause Mr. Warner to lower his selling price for his property, and it is also understandable that Mr. Tucker would mention the State's reluctance to exercise its power of condemnation to make certain that Mr. Warner was aware of the fact that his property could be condemned, without running the risk of alienating the Warners by expressly threatening condemnation.

In the context of Mr. Tucker's various visits to Mr. Warner and other land owners in the area, which negotiations with Mr. Warner continued even after Mr. Warner had refused Mr. Tucker's offer of $75,000 to $80,000 for the Ward tract and had stated a price of $600,000 for his property, which price was unacceptable to Mr. Tucker; the appearance of the newspaper article read by the Warners; the site inspections conducted by various Conservation Department officials as stated in the newspaper article (and as testified to by Mr. Warner at Record 99-101, 123); the appearance of Mr. Derks in the area in late 1964 and his negotiations with Mr. Warner, Mr. Masterson, and other land owners in the area; and the appearance of a drilling rig on Mr. Masterson's property for the purpose of taking soil samples, the entire factual situation must be viewed as justifying Mr. Warner's feeling of there being an "undesirable impending consequence" within the meaning of *S. & B. Realty Co.* as the result of the planned park project, thereby making it indeed reasonable for Mr. Warner to conclude that the State was going to acquire his property for use as a State park and that his property was being subjected to a threat or imminence of condemnation as defined in *S. & B. Realty Co.* Therefore, by failing to reverse the Tax Court decision, the Court of Appeals committed a grave error which resulted from its failure to

correctly apply the test of reasonableness to the entire factual situation in the case.

In view of the fact that the Court of Appeals has seriously misapprehended and misapplied the correct legal standard to arrive at a result which is contrary to existing case law and will inflict serious and irreparable financial injury upon the Warners, and other taxpayers similarily situated, this Court should grant certiorari to cure and rectify the error committed by the Court of Appeals.

CONCLUSION.

For the reasons set forth above, it is respectfully prayed that a writ of certiorari be granted to review the order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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THORNBURG, MCGILL, DEAHL,
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South Bend, Indiana 46601,
Attorney for Petitioners, Edward Warner and Elizabeth Warner.

APPENDICES.

APPENDIX A.

ORDER[7] OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND ORDER ON PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued February 16, 1973

June 25, 1973

Before

HON. LUTHER M. SWYGERT, *Chief Judge*

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. JOHN PAUL STEVENS, *Circuit Judge*

EDWARD WARNER and ELIZABETH WARNER,
Petitioners-Appellants,

No. 72-1087 *vs.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the Decision of the Tax Court of the United States.

No. 1705-69

ORDER.

Edward and Elizabeth Warner appeal from a judgment of the United States Tax Court which disallowed their nonrecognition of gain under Section 1033 of the Internal Revenue Code. That provision allows an exception to normal recognition of

7. This is the "corrected" order. See the explanation at footnote 5, *supra*.

gain from sale of property when property is converted because of "condemnation or threat or imminence thereof." The Tax Court found that none of these circumstances pertained to a 1965 sale of property by the Warners. On this appeal, the sellers argue that the Tax Court erred in making two findings of fact related to threats of condemnation. They assert, moreover, that even if the Tax Court correctly found the facts, its ruling must be reversed, being based on a misapprehension of the true standard of "threat" as used in Section 1033.

The Warners owned Michigan land in 1964. Having offered some of this for sale, they were contacted by two buyers prior to the close of that year. The first was Theodore R. Tucker, the land acquisition supervisor of the Michigan Department of Conservation. Tucker identified himself to the Warners and expressed an interest on behalf of his principal in acquiring certain tracts of their land for use as a state park. The Tax Court found "that petitioner [Warner] was informed by Tucker that . . . funding difficulties and limitations on the State's ability to proceed definitely precluded any possibility of condemnation." The second buyer to approach the Warners was Gerald A. Derks, who had been hired by a public utility company, Consumers Power Company, (CPC), to acquire land for a generator site. Derks did not reveal the identity of his principal, however, as CPC wished to maintain its part in the acquisition secret until all land necessary for the site had been purchased. Derks' agreement with CPC also required that he not reveal that his principal had the power of condemnation. Although Mr. Warner testified that Derks breached this last condition by threatening him with condemnation upon his refusal to sell, the Tax Court accepted Derks' assertion that he had kept his promise of silence. The Warners finally sold their property to Derks in 1965.

The Warners argue that the Tax Court clearly erred in finding that Tucker had told them that condemnation by the State would not occur. In support of its holding, the Tax Court placed prime reliance on the following testimony from Tucker:

Q. Was condemnation mentioned in your negotiations with Mr. Warner?

A. At any time?

Q. Yes.

A. Yes, the subject was brought up by Mr. Warner. We find clients always have an interest in what our inherent powers are and the extreme reluctance of the Department of Conservation and the limited history of condemnation is always brought to the fore at this point. In my twenty-five years with this division it had less than four cases. This is always brought out, and the funding difficulties and situations and limitations on our ability to proceed definitely precluded any possibility of condemnation.

We must agree that this statement fails to support the finding of the Tax Court. The Government cites additional testimony of Tucker to the effect that he informed the Warners of funding difficulties in connection with the proposed park, but it cannot seriously be contended that statements of this sort bear more than remotely on the possibility that Tucker discussed his inability to condemn with the Warners. Be that as it may, Mr. Warner himself testified:

Q. Did he [Tucker] discuss condemnation with you?

A. The first time that I met him?

Q. At any time.

A. No, he didn't.

Q. I'm not referring to the first time.

A. No, he knew, we both understood that the Park had the right, we knew the Park, he told me or I told him that I knew the Park had a right to condemn.

Q. Then you did discuss condemnation?

A. Yes, we did discuss it. *He didn't say he was going to condemn me, but I knew they could.* (Emphasis supplied.)

We find this admission by Warner more than sufficient to support the ultimate holding of the Tax Court that Warner's dealings with Tucker gave rise to no reasonable inference on

Warner's part that the condemnation of his land was threatened or imminent.

The Warners would avoid the testimony of Derks by casting him as a liar. Having carefully reviewed the record, and recognizing that the Tax Court heard and observed the witnesses, we cannot conclude that Derks' testimony was incredible as a matter of law or that Mr. Warner's testimony was necessarily more worthy of trust than that of Derks. We therefore uphold the Tax Court in its acceptance of Derks' version of his dealings with Mr. Warner.

Lastly, the Warners accept *arguendo* the Tax Court's version of the facts, but argue that the court erred in assessing the legal implications thereof. We cannot agree. The Tax Court has consistently endorsed the following interpretation of Section 1033:

> It is significant that the word "threat" was used in section 1033. This is indicative of the fact that the statute does not require that the possibility of condemnation be reduced to a certainty. Any reasonable construction of the word must recognize the possibility that the impending, undesirable consequence may never occur. The crucial factor is that the petitioner was compelled by this impending consequence to take evasive action. *S & B Realty Company,* 54 T. C. 863, 870 (1970).

The Tax Court reaffirmed this doctrine in dealing with the instant case, and, with a view to the facts as found, we hold that it did not err in requiring the Warners to recognize the gain realized from their sale of property to Derks.

The decision of the Tax Court is affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 6, 1973

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*

EDWARD WARNER and ELIZABETH WARNER,
Petitioners-Appellants,
No. 72-1087 *vs.*
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the Tax Court of the United States. (1725-69)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

APPENDIX B.

OPINION OF THE UNITED STATES TAX COURT.

56 T. C. No. 85

UNITED STATES TAX COURT

EDWARD WARNER and ELIZABETH WARNER, *Petitioners* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Docket No. 1725-69. Filed August 23, 1971.

Petitioner sold various tracts of land at a gain in 1965, reinvested part of the proceeds therefrom, and claimed nonrecognition treatment under section 1033.

Held, petitioner did not sell his property as a result of the threat or imminence of condemnation.

Held, further, allocation of sales proceeds to various properties determined.

John L. Carey and *Stephen A. Seall*, for the petitioners.

James J. McGrath, for the respondent.

IRWIN, *Judge*: The Commissioner determined a deficiency in petitioners' income tax for the taxable year 1965 in the amount of $80,780.33. We must first decide whether petitioners sold certain real property under threat or imminence of condemnation so as to satisfy section 1033 of the Internal Revenue Code of 1954.[1] In the event we decide this issue in the negative, we must then determine whether respondent's allocation of the sales proceeds was correct.

---

1. All statutory references are to the Internal Revenue Code of 1954 as amended, unless otherwise indicated.

FINDINGS OF FACT.

Edward Warner (hereinafter petitioner) and his wife, Elizabeth Warner, who resided in Tremont, Ind., at the time they filed the petition herein, filed[2] a joint Federal income tax return for the calendar year 1965 with the district director of internal revenue, Indianapolis, Ind.

As of the date of the trial herein, petitioner had been engaged in the real estate business for approximately 25 years. While he was licensed to sell real estate in Indiana, petitioner was at no time licensed to sell in Michigan.

Petitioners acquired the following tracts of land in Van Buren County, Mich., on the dates indicated:

Description of Real Estate	Date of Acquisition
Potts (150 acres)	April 1960
Hedlund (4 acres)	November 1961
Ward (7 acres)	September 1961

What originally drew petitioner's attention to the Potts land was a large billboard for-sale sign located thereon.

Petitioner did not remove the sign after purchasing the property. The previous owner, Potts, whose name appeared on the sign and who was still receiving inquiries concerning the property, requested petitioner to remove it. Instead, petitioner crossed out the former owner's name and inserted his own name thereon.

Petitioner placed an advertisement offering to sell some of his land in Van Buren County in the Wall Street Journal sometime during the period 1962 to 1964.

In addition to the aforementioned tracts of land, petitioner

2. Petitioners applied for an extension of time until June 15, 1966, to file their 1965 income tax return. The reason for the request was stated in the application as follows:

> Complications arising from an involuntary conversion of property make it necessary to request this extension. It is possible no additional tax is due.

had been interested prior to and during 1964 in acquiring the following properties which were located in the same vicinity:

Chase (5 acres)
Eldridge (13 acres)
Chase (12 acres)

As early as 1961 and again in 1963, the State of Michigan was considering and investigating the purchase of land near the city of Saugatuck for a state park. In January 1964, the Van Buren County road commission (hereinafter sometimes referred to as the commission) and the state legislature agreed to substitute a park in Van Buren County for the potential park at Saugatuck.

In February 1964, a meeting attended by, among others, various state senators and representatives as well as department and township officials was held in Lansing, Mich. At that meeting, the county road commision agreed to continue its efforts to acquire the Drake property located in Van Buren County on Lake Michigan and situated near the real estate owned by petitioner. Furthermore, it indicated that it would be able to fund a purchase from the Drake estate in terms of $125,000. State representatives agreed that up to $100,000 in state funds would be made available to augment the Drake tract, which was regarded as the hard core portion of the proposed park area.

On July 1, 1964, the Michigan legislature provided an appropriation of only $10,000 for the purpose of taking options for the purchase of additional property for the proposed state park.

The proposed park as originally conceived would have extended from just north of the Drake property down through the Ward, Masterson, Peters, Chase, Hedlund, and Eldridge properties to a point just south of the Potts land. However, the park boundaries were changed thereby reducing the size of the park when the State discovered sometime in January 1965 that Consumers Power Company (hereinafter CPC), a public utility

under the laws of Michigan, was also interested in acquiring some of the same land. Not having the necessary funds to finance acquisition, the State of Michigan could not compete effectively with CPC. However, Van Buren County did commence negotiations for the purchase of the Drake property sometime in February 1964. At no time during 1964 did anyone from the Department of Conservation take soil samples from the Drake property. The purchase was consummated sometime in January 1965 at a price below the fair market value thereof. The owners of the Drake property were wealthy individuals who were sincerely interested in park objectives and who desired to sell the Drake property to the County only if they could be assured that it would eventually become state owned as part of the park system.

As of the date of the trial, T. R. Tucker (hereinafter Tucker), who was the senior park land acquisition man during 1964, was the lands acquisition supervisor of the Michigan Department of Natural Resources, formerly called the Department of Conservation. He had been employed by the State in various capacities all dealing with land acquisition for approximately 25 years.

After observing the for-sale sign located on the Potts tract owned by petitioner, Tucker contacted him in early February 1964 in his capacity as agent for the State of Michigan. Tucker identified himself as such to petitioner and explained to him Michigan's interest in the planned park, its funding situation, and its interest in determining on an exploratory basis which properties were for sale in the area.

During the period February to November 1964, Tucker met with petitioner several times and also talked with him several times on the telephone in connection with the sale of his property. At one of their meetings, petitioner showed Tucker the advertisement he had placed in the Wall Street Journal to sell his land in Van Buren County for approximately $600,000.

Tucker believed that petitioner overestimated the value of his land.

Tucker offered to purchase petitioner's Ward property, which was the State's prime interest, for $75,000 or $80,000. If funds were available, the State was also interested in the Potts and Hedlund properties as well as the two Chase tracts and the Eldridge land.

Petitioner, who owned some property in Indiana involved in condemnation, brought up the topic of condemnation during the course of his negotiations with Tucker. Tucker informed petitioner of the State's extreme reluctance to exercise its power of condemnation and of its limited history of condemnation. Tucker also indicated to petitioner on several occasions that there was a limitation of the funds available for the proposed park. Moreover, petitioner was informed by Tucker that the funding difficulties and limitations on the State's ability to proceed definitely precluded any possibility of condemnation.

On April 16, 1964, the following article appeared in the News-Palladium, a newspaper published in Benton Harbor, Mich.:

NEW STATE PARK FOR AREA!

* * * * *

613 Acres Of Lake Dunes In Van Buren
Winter And Summer Use Is Planned

Complete Project To Take 10 Years, Cost $3,500,000

* * * * *

SOUTH HAVEN—Plans to develop a 613-acre state park in uninhabited Lake Michigan sand dune country five miles south of here were unveiled today in a joint announcement by the Michigan Department of Conservation, the Van Buren County Board of Supervisors and the Van Buren County Road Commission.

The year-round recreation park is expected to be completed in about 10 years with an estimated investment of state and county funds totaling $3,500,000.

* * * * *

Agreements to purchase portions of the park site have been adopted by the conservation department and the county board of supervisors. Cost of acquiring the desired property fronting on Lake Michigan has been estimated at $500,000, according to Ivan Stein of rural South Haven, Van Buren road commission chairman.

DELAYED ANNOUNCEMENT

Van Buren supervisors voted to purchase 197 acres of property comprising the northern part of the proposed park during the Tuesday board meeting. Announcement was held up until county officials completed negotiations yesterday to purchase the 197 acres from the estate of the late Harry L. Drake of Chicago.

The joint announcement said financial plans call for eventual purchase of the county's share by the state. Then the Department of Conservation would take over administration of the area as a state park.

Tentative plans by the state include spending about three million dollars for development of recreation area over a ten-year period.

* * * * *

The 197-acre Drake estate plus another 22 acres considered for purchase by the county and more than 80 acres acquired by Van Buren county in the past 24 years through tax reversion sales, will be joined on the south by about 300 acres to be acquired by the state.

* * * * *

Arthur Elmer, head of the conservation department's park division, said negotiations now are under way on several tracts of land. He said a request that money be appropriated to secure the options will go to the Legislature next year.

* * * * *

PARK STUDY MADE

In 1962, the board directed the county road commission to assure statutory duties as county park trustees for the purpose of studying feasibility of a major park development. [*sic*]

* * * * *

> The road commission continued its study through the summer of 1963 with cooperation of board of supervisors and officials of South Haven city and township and Covert township. Last November, preliminary negotiations were begun with major property owners.
>
> REIMBURSE COUNTY
>
> Realizing the ultimate potential of the county recreation area, road commission officials conferred with Root and Hilbert and eventually the state-county venture was proposed. Elmer and other conservation department officials inspected the site and further meetings led to the development of the present financing plan.
>
> As additional finances become available to the conservation department, the county will be reimbursed for its expenditures and title to the land then will be transferred to the state.

An aerial photograph and map of the land involved in the proposed park appeared in the newspaper along with the article. The Ward, Hedlund, Potts, Eldridge, and two Chase tracts all appeared within the proposed park boundaries. Petitioner saw this newspaper article one or two days after it appeared.

Unknown to petitioners, their land in Van Buren county was also within the boundaries of a proposed generating site for CPC. Although two or three sites in southwestern Michigan were being considered by CPC, in mid-autumn 1964, the Van Buren County site was selected. In late November 1964, the decision to acquire land in that county was made at CPC's annual budget review.

CPC desired to keep its interest in acquiring property in Van Buren County a secret because it is easier for a large industry interested in assembling a large site of property to acquire the land and it is also usually cheaper if the identity of a prospective purchaser is unknown.

In order to maintain secrecy, CPC used an agent, Gerald Derks (hereinafter Derks), who was to acquire all property for it under a contract expressly requiring him to keep CPC's

identity confidential. All options for the purchase of property were acquired in Derk's name until June 1965, at which time a news release revealed CPC's acquisition of the land.

Derks was selected to represent CPC because he was well known, experienced and highly regarded as a dependable realtor in southwestern Michigan. He had been in the real estate business for about 22 years.

Derks agreed not to divulge CPC's interest in purchasing land in Van Buren County and he also was forbidden from revealing that he represented someone who had the power to condemn.

According to the agreement with CPC, Derks was entitled to a per diem allowance of $150 plus expenses. Moreover, he was to receive a lump sum of $100 for each parcel of real estate closed. However, the $100 per parcel fee was to be paid in lieu of the per diem expense on the closing date and was also to be used to cover the costs of closing plus acquiring mortgage releases and similar types of title work.

On December 10, 1964, Derks acquired an option to purchase the Masterson tract which was situated approximately in the center of the proposed plant site. The Masterson property was relatively small and was so located as to permit taking soil samples by drilling unobserved from a road nearby. Commencing in mid-December 1964 and continuing for a period of approximately one month, soil samples were taken on the Masterson tract. However, it was not until after the public announcement of CPC's interest in property in Van Buren County that surveyors first appeared on its behalf. In fact, the first surveys made under the direction of CPC were made in mid-1965 or early 1966.

Derks first became acquainted with the property petitioner owned in Van Buren County because there was a for-sale sign on the Potts property which was located approximately in the middle of the property which he was supposed to acquire for CPC. Derks initially contacted petitioner during approximately the first week of December 1964. It was also approximately

at this same time that Derks became aware of the State of Michigan's interest in the property located in the vicinity of the Drake, Masterson, and Ward tracts.

When Derks first met with petitioner, he did not mention to him that he was representing an undisclosed party. Nor did petitioner tell Derks that he was negotiating with Tucker, the State representative, in connection with the purchase of the Potts and Ward properties. Derks learned of the proposed state park either from petitioner or from Masterson, the owner of the Masterson tract.

During the course of his negotiations with petitioner, Derks may have mentioned to him that Masterson had already agreed to sell his property to Derks.

Derks did not tell petitioner that he was representing someone who had the power to condemn his property nor did Derks in any way threaten petitioner with language such as "this is it" or "we mean business."

Petitioners entered into an agreement with Derks on December 29, 1964, to sell to him the Potts land for $350,000.

On January 5, 1965, petitioners entered into an agreement with Derks to sell the Hedlund, Ward, Eldridge, and two Chase tracts for $120,000. Tucker made no further contacts with petitioner after he learned that petitioner contracted to sell his land to Derks.

Since petitioners did not own the two Chase tracts and the Eldridge property on that date, the sales agreement provided as follows:

> If seller [petitioner] is unable to deliver title to part of parcels "B" or "C" [two Chase and Eldridge tracts], purchase price to be reduced proportionately at the rate of $2,000.00 per acre.

Although it was difficult to arrive at a figure, the parties agreed that this $2,000 per acre reduction of the purchase price seemed fair under the circumstances for road frontage in that location.

The Hedlund, Chase, Eldridge and Chase tracts were all very similar in their characteristics. Petitioner estimated the value of the Ward tract, which was lakefront property and which had buildings on it, at approximately $70,000.

Both of the aforementioned real estate contracts were modified by the parties thereto to effect an extension of each sale to July.

Petitioners finally acquired the following tracts on the dates indicated:

Property	Date Acquired by Petitioners
Chase (5 acres)	April 1965
Eldridge (13 acres)	May 1965
Chase (12 acres)	April 1965

On July 6, 1965, petitioners, who remained in possession of their land until that date, conveyed the Potts property by one deed and conveyed the Hedlund, Ward, Eldridge, and two Chase tracts by another deed to CPC. Both of these deeds were recorded on September 9, 1965.

In the latter part of December 1964, Derks informed William L. Reid (hereinafter Reid), who was assistant to the manager of the land and right-of-way department of CPC at that time, that there appeared to be an interest by Michigan in acquiring some property in Van Buren County. Sometime later, Derks learned of and informed Reid of the newspaper article that appeared in The News-Palladium and also of the option acquired by Michigan on the Drake property, whereupon Derks was instructed to contact the Michigan Department of Conservation to see if some arrangement could be worked out that would permit the state park as well as the plant project to succeed.

In the spring of 1965, an exchange agreement was worked out between Derks and the State of Michigan because CPC needed land for its generating site and the State desired to have some of the lakefront property which CPC had already

acquired. The agreement was not designed or intended to reduce the cost to both parties of acquiring land. When the exchange agreement was negotiated, neither the identity of CPC nor the intended use of the property was revealed.

Part of the property to be exchanged by CPC was the Ward tract which it made available for use to the State in the summer of 1965 even though the formal exchange had not yet taken place.

All totaled, approximately 58 tracts of land were acquired by CPC for its generating site in Van Buren County. None of these were condemned by CPC.

Petitioners reported the sale of their property located in Van Buren County on their 1965 Federal income tax return as follows:

CAPITAL GAIN

1965

Property	Date Acquired	Date Sold	Gross Sales Price	Depreciation Allowed or Allowable	Basis	Expense of Sale	Gain Short Term	Gain Long Term
Potts (150 acres)	4-60	7-1-65	$350,000	—	$68,000	$ 459.80	—	$281,540.20
Hedlund (4 acres)	11-61	7-1-65	5,295	—	2,500	174.52	—	2,620.48
Ward (7 acres)	9-61	7-1-65	75,000	$2,169.76	22,796	305.41	—	54,068.35
Chase (5 acres)	4-65	7-1-65	6,615	—	3,500	218.15	$ 2,896.85	—
Eldridge (13 acres)	5-65	7-1-65	17,205	—	3,050	567.19	13,587.81	—
Chase (12 acres)	4-65	7-1-65	15,885	—	3,500	523.79	11,861.21	—
			$120,000	$2,169.76	$35,346	$1,789.06	$28,345.87	$ 56,688.83

Taxpayers elect to not recognize gain to the extent of reinvesting the net proceeds in replacement property.
Gain is recognized on the Potts land to the extent it was not reinvested.

See the following Gain on Involuntary Conversion schedule.	$68,788.94
TOTAL NET CAPITAL GAIN	$68,788.94

GAIN ON INVOLUNTARY CONVERSION

Property	Sales Price	Expense	Net Proceeds	Amounts used for Replacement	Gain Recognized
Potts (150 acres)	$350,000	$ 459.80	$349,540.20	$280,751.26	$68,788.94
Hedlund (4 acres)	5,295	174.52	5,120.48	5,120.48	—
Ward (7 acres)	75,000	305.41	74,694.59	74,694.59	—
Chase (5 acres)	6,615	218.15	6,396.85	6,396.85	—
Eldridge (13 acres)	17,205	567.19	16,637.81	16,637.81	—
Chase (12 acres)	15,885	523.79	15,361.21	15,361.21	—
TOTALS	$470,000	$2,248.86	$467,751.14	$398,962.20	$68,788.94

REPLACEMENT PROPERTY

Purchase Date	Name and Description	Cost
11-65	K40—40 acres—Chesterton	$85,000.00
8-65	320 Wash.—House—Michigan City	6,000.00
8-65	255 Mockingbird—House—Portage	11,350.00
8-65	10¾ acres—Beverly Shores	12,500.00
3-66	Koselke Farm—120 acres—Chesterton	43,112.20
4-66	DuSable Arms—Apt. Bldg.—Gary	241,000.00
TOTALS		$398,962.20

Respondent disallowed the claimed nonrecognition of gain on the sale and allocated the sale prices as follows:

Date Acquired	Date Sold	Kind of Property	Gross Sales Price	Depreciation Allowed	Cost or Other Basis & Expense of Sale	Gain
		SHORT-TERM CAPITAL GAINS				
4-65	7-65	Chase—5A	$ 60,000	—	$ 3,718.15	$ 48,640.87
5-65	7-65	Eldridge—13A		—	3,617.19	
4-65	7-65	Chase—12A		—	4,023.79	
NET SHORT-TERM GAIN						$ 48,640.87
		LONG-TERM CAPITAL GAINS				
4-60	7-65	Potts—150A	$350,000	—	$68,459.80	281,540.20
11-61	7-65	Hedlund—4A	60,000	—	2,674.52	36,393.83
9-61	7-65	Ward—7A		$2,169.76	23,101.41	
Other long-term gain per return						3,655.49
NET LONG-TERM GAIN						$321,589.52

OPINION

Petitioners reported the sale of certain real property located in Van Buren County, Mich., on their Federal income tax return for 1965. However, they elected not to recognize the gain in connection therewith to the extent reinvested in replacement property on the ground that their real estate was sold under threat of condemnation by a public utility.

Respondent determined that petitioners were not entitled to nonrecognition treatment under section 1033[3] because the sales

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3. SEC. 1033. INVOLUNTARY CONVERSIONS.

(a) General Rule.—If property (as a result of * * * condemnation or threat or imminence thereof) is compulsory or involuntarily converted—

(3) Conversion into money where disposition occurred after 1950.—Into money or into property not similar or related in service or use to the converted property, and the disposition of the converted property (as defined in paragraph (2) occurred after December 31, 1950, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

(A) Nonrecognition of gain.—If the taxpayer during the period specified in subparagraph (B), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, * * * at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property * * *. Such election shall be made at such time and in such manner as the Secretary or his delegate may by regulations prescribe. * * *

(g) Condemnation of Real Property Held for Productive Use in Trade or Business or for Investment.—

(1) Special rule.—For purposes of subsection (a), if real property (not including stock in trade or other property held primarily for sale) held for productive use in trade or business or for investment is (as the result of its * * * condemnation, or threat or imminence thereof) compulsorily or involuntarily converted, property of a like kind to be held either for productive use in trade or business or for investment shall be treated as property similar or related in service or use to the property so converted.

in question were not made under threat or imminence of condemnation.[4]

In his opening statement, petitioners' attorney stated as follows:

> [I]t is our contention that there was a continuous threat of condemnation from the State of Michigan * * * aimed toward acquiring the land for use as a State Park, and an independent threat of condemnation arising as a result of Mr. Derks' negotiations and statements to the taxpayer.

Before dealing specifically with the contentions of the parties, we must make some preliminary observations concerning a conflict in the testimony of petitioner and of Derks.

Petitioner testified that Derks warned him that although he could not reveal the identity of the party whom he was representing, that party possessed the power to condemn his real property. Petitioner further testified that Derks' statement, coupled with other events occurring in 1964, caused him to sell his real estate to Derks at a price which he would have been unwilling to accept in the absence of such a threat of condemnation.

Derks, on the other hand, denied ever advising petitioner that he represented an undisclosed party who had the power to condemn petitioner's real property.

Having considered every detail of the record and having exercised great care in evaluating the inconsistencies in some of the details of Derks' testimony and some other witnesses, we are unable to conclude that Derks' testimony has been discredited or that he is unworthy of belief. While we are not at liberty to disregard arbitrarily the uncontradicted and unimpeached testimony of a taxpayer, *Jay A. Williams*, 28 T. C. 1000 (1957); *Arthur N. Blum*, 11 T. C. 101 (1948), affd.

4. There is also disagreement between the parties as to the nature of the two Chase tracts and the Eldridge tract; that is whether these tracts constituted investment property.

183 F. 2d 281 (C. A. 3, 1950), petitioner's testimony herein stands contradicted on its face by the testimony of Derks.

Petitioner was a somewhat voluble and at times evasive witness. Moreover, our impressions of his demeanor in testifying created in us serious doubts as to his sincerity and we remain unconvinced that he was not coloring the material facts to which he testified. See *Quock Ting* v. *United States*, 140 U. S. 417 (1891). Having painstakingly reviewed our impressions of the witnesses in determining the weight to be accorded petitioner's testimony, we are constrained to conclude, and we have found as a fact, that Derks did not in any way indicate to petitioner that he was representing a party who possessed the power to condemn his property.

On brief, petitioner argued in anticipation of our aforementioned finding that such a finding would not be determinative of whether he sold the property in question under threat or imminence of condemnation because there are other events and circumstances which he contends will bring him within the terms of section 1033.

In particular, petitioner points to the following events:

(1) Tucker approached petitioner in early February 1964 in connection with the State of Michigan's interest in acquiring land for a proposed park.

(2) On April 16, 1964, a newspaper article appeared in The News-Palladium describing the State's plans to develop, in conjunction with Van Buren County, a state park in an area where petitioner's property was located.

(3) Tucker met with petitioner on several occasions following the publication of that article and offered to purchase the Ward property for approximately $75,000 or $80,000. Moreover, Tucker discussed with petitioner in general terms the possibility of acquiring the Potts and Hedlund properties. Petitioner brought up the topic of condemnation during one of his meetings with Tucker.

(4) Petitioner alleged that after the appearance of Tucker and the newspaper article, a lot of activity occurred on the Drake tract including the following: groups of men carrying folded drawings who inspected the Drake property; the placement of newly painted green trash cans on that property; the construction of a two-acre parking lot thereon, as well as the appearance of a drilling rig for the purpose of taking soil samples.

Petitioner argues that in view of the aforementioned circumstances, he felt it was inevitable that the State was going to acquire his property for purposes of devoting it to use as a state park and that he would not be permitted to retain possession of his real estate.

While we reaffirm our prior position that a party who is under threat or imminence of condemnation may sell his property to a person other than the one who has created such threat or imminence and still come within the purview of section 1033, *S. & B. Realty Co.*, 54 T. C. 863 (1970); *S. H. Kress & Co.*, 40 T. C. 142 (1963); *Harry G. Masser*, 30 T. C. 741 (1958), we simply cannot find that petitioner sold the property in question under such a threat or imminence of condemnation to Derks (the other party).

First of all, it is noteworthy that petitioner's portrayal of these events is misleading and lacking in certain crucial facts. In our findings of fact, we related what transpired during Tucker's meetings with petitioner. Tucker, after having identified himself as an agent for the State of Michigan, explained to petitioner the State's interest in the proposed park, its funding situation, and its interest in discerning on an exploratory basis which tracts of land were for sale in the area. Moreover, in response to petitioner's inquiries regarding condemnation, Tucker told him of the State's extreme reluctance to exercise its power of condemnation and of its its limited history thereof. Tucker indicated to petitioner on several occasions that there

was a limitation on the funds available for the proposed park. Furthermore, Tucker brought out in his conversations with petitioner that these funding difficulties and limitations on the States' ability to proceed definitely precluded any possibility of condemnation.

Given these circumstances, we doubt that any reasonable man[5] would construe the events transpiring during 1964 and during the year at issue as signifying that the State was going to acquire petitioner's property for purposes of devoting it to use as a state park and that he would not be permitted to retain possession of it.

We have recently held, as petitioner points out, that section 1033 does not require that the possibility of condemnation be reduced to a certainty, noting that "any reasonable construction of the word [threat] must recognize the possibility that the impending, undesirable consequence may never occur." *S. & B. Realty Co., supra,* at 870. This language, however, in no way implies that the remote possibility of condemnation is sufficient to constitute a threat or imminence thereof. The facts of the instant case present at the most a remote possibility of condemnation in that Tucker, speaking as agent for the State of Michigan, informed petitioner that its limited funding situation precluded the possibility of condemnation. We agree with petitioner that the fact that Tucker did not tell petitioner that his property would without a doubt be condemned if agreement were not reached on a price for the sale of that property should not in and of itself be construed as precluding the existence of a threat or imminence of condemnation. However, not only did Tucker not tell petitioner that his property would be condemned, but he stated to him that his property would not be condemned in view of the State's funding problems. There-

5. Although we do not find it necessary on these facts, we would be inclined to apply the standard of a reasonable and experienced realtor in a situation such as this where petitioner had been engaged in the real estate business for approximately 20 years as of the year at issue.

fore, it is clear to us that the compulsion under which the taxpayers acted in *S. & B. Realty Co., supra,* and *Frank O. Maixner,* 33 T. C. 191 (1959), is lacking here.[6] Since petitioner did not have actual notice of, nor could he reasonably infer from the events which occurred, any undesirable, impending consequence, there could be no compelling reason for him to convert his property into cash. Cf. *S. & B. Realty Co., supra,* and *Frank O. Maixner, supra.* Accordingly, we hold that there was no threat or imminence of condemnation at the time petitioner sold the property in question,[7] and therefore petitioners are not entitled to nonrecognition treatment under section 1033.

The foregoing remarks are applicable to the sale of all six[7] tracts of land. However, as to the two Chase tracts and the Eldridge property, there are additional reasons why those three pieces of property were not involuntarily sold by petitioner as a result of threat or imminence of condemnation.

Petitioner did not even own those three properties at the time he contracted to sell them to Derks on January 5, 1965. The sales agreement provided that if petitioner could not deliver title to the two Chase and Eldridge tracts, the purchase price would be reduced proportionately at the rate of $2,000 per acre. Petitioner, who agreed to sell property which he did not

6. In the *S. & B. Realty Co.* case, we found as a fact that the taxpayer had actual notice that his property would have been condemned had he done nothing. 54 T. C. at 870. Moreover, we specifically stated that the crucial factor therein was that the taxpayer was compelled by the impending consequence of condemnation to take evasive action.

In the *Maixner* case, we noted that we had no doubt that the statements made to the taxpayers by a state representative were taken by them to mean that if they did not enter into the agreements he proposed, their property would be condemned. Moreover, we established a test of reasonableness therein when we stated: "it was reasonable for petitioners to infer that [the state representative] * * * spoke with sufficient authority to make it likely that his threats could and would be carried out if petitioners did not execute the agreements he presented." 33 T. C. at 195.

7. Potts, Hedlund, Ward, Eldridge, and two Chase tracts.

even own and who thereafter acquired that property, even assuming that all the time he knew that there was a threat or imminence of condemnation thereof, cannot be said to have involuntarily converted that property *as a result* of the threat or imminence of condemnation. Moreover, petitioner did not know nor could he have reasonably inferred from the events we have recounted that there was a threat or imminence of condemnation of the Eldridge property and the two Chase tracts. In fact, he knew that condemnation was not likely to occur.

Turning now to the allocation of the $120,000 in sales proceeds to the Ward, Hedlund, Eldridge, and two Chase tracts, petitioner allocated the sales price as follows:

Property	Sales Price
Hedlund (4 acres)	$ 5,295
Ward (7 acres)	75,000
Chase (5 acres)	6,615
Eldridge (13 acres)	17,205
Chase (12 acres)	15,885
	$120,000

Respondent determined that $60,000 of the proceeds was attributable to the thirty acres in the two Chase and Eldridge tracts since the sales agreement provided for a reduction of $2,000 per acre if petitioner could not deliver title to part or all of those three properties.

Petitioner contends that the $2,000 figure was in the nature of a penalty for his failure to be able to convey such properties. He testified that he never considered the $2,000 per acre figure as representative of the actual value thereof. Moreover, he testified that he believed the value of the Ward property, which had frontage on Lake Michigan, was approximately $70,000 at the time he sold it. Tucker did offer in 1964 to purchase the Ward property for $75,000 or $80,000.

We agree with petitioner that the $2,000 per acre figure was more in the nature of a penalty for failure to perform the contract than an indication of the value of the two Chase tracts and the Eldridge property. From a careful review of the entire record, we conclude that the value of the Ward property and the portion of the sales proceeds allocable thereto was $70,000. The remaining $50,000 shall be allocated proportionately to the Hedlund, Eldridge, and two Chase properties (34 acres all totaled) since they were very similar in their characteristics and were not lakefront property.

In order to reflect the conclusions reached herein,

Decision will be entered under Rule 50.

APPENDIX C.

RELEVANT TEXT OF SECTION 1033 OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED.

Sec. 1033. INVOLUNTARY CONVERSIONS:

(a) GENERAL RULE—If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted—

* * * * *

(3) CONVERSION INTO MONEY WHERE DISPOSITION OCCURRED AFTER 1950—Into money or into property not similar or related in service or use to the converted property, and the disposition of the converted property (as defined in paragraph (2)) occurred after December 31, 1950, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

(A) NONRECOGNITION OF GAIN—If the taxpayer during the period specified in subparagraph (B), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, or purchases stock in the acquisition of control of a corporation owning such other property, at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property or such stock. Such election shall be made at such time and in such manner as the Secretary or his delegate may by regulations prescribe. For purposes of this paragraph—

* * * * *

(g) CONDEMNATION OF REAL PROPERTY HELD FOR PRODUCTIVE USE IN TRADE OR BUSINESS OR FOR INVESTMENT—

(1) SPECIAL RULE—For purposes of subsection (a), if real property (not including stock in trade or other property held primarily for sale) held for productive use in trade or business or for investment is (as the result of its seizure, requisition, or condemnation, or threat or imminence thereof) compulsorily or involuntarily converted, property of a like kind to be held either for productive use in trade or business or for investment shall be treated as property similar or related in service or use to the property so converted.

* * * * *"

REME COURT, U. S.
JAN 9 1974
MICHAEL RODAK, JR., CLERK

No. 73-720

In the Supreme Court of the United States

OCTOBER TERM, 1973

EDWARD WARNER AND ELIZABETH WARNER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE REPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE REPONDENT IN OPPOSITION

Section 1033 of the Internal Revenue Code permits the non-recognition of gain from the involuntary conversion of property as a result of condemnation or "threat or imminence" of condemnation. Both courts below concluded that petitioner[1] was not compelled to convert his property involuntarily when he sold it (Pet. App. A4, A24-A25). Petitioner seeks further review of that factual determination.

For purposes of qualification under Section 1033, the conversion, whether pursuant to a condemnation proceeding or under a threat of taking, must be involuntary

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[1] References to petitioner are to Edward Warner. His wife is a party because she filed a joint return with her husband for 1965.

and motivated by a force beyond the property owner's control. *Dear Publication and Radio, Inc.* v. *Commissioner,* 31 T.C. 1168, 1174, affirmed, 274 F. 2d 656, 660 (C.A. 3). See *Steuart Brothers* v. *Commissioner,* 261 F. 2d 580, 582 (C.A. 4). Whether a sale of property is made under threat or imminence of condemnation is a question of fact to be decided by taking into account all the facts and circumstances known to the seller at that time. *Maixner* v. *Commissioner,* 33 T. C. 191, 195; *Carson Estate Co.* v. *Commissioner,* 22 T.C.M. 425; *Stone* v. *Commissioner,* 32 T.C.M. 94. While the statute does not require that the possibility of condemnation be reduced to a certainty, and recognizes the possiblity that the impending, undesirable consequence may never occur, the crucial factor is whether petitioner was compelled to take action to avoid the undesirable consequence. *S&B Realty Co.* v. *Commissioner,* 54 T.C. 863, 870.

Here, the record demonstrates that petitioner could not reasonably have believed that his land was under threat or imminence of condemnation when it was sold in 1965. To the contrary, he voluntarily sold it to Gerald Derks, an undisclosed agent of Consumers Power Company (Pet. App. A12-A14). Although T. R. Tucker, the senior parkland acquisition supervisor for the Michigan Department of Natural Resources, had previously approached petitioner with regard to acquiring his properties for a proposed park, he told petitioner that the state was extremely reluctant to exercise the power of condemnation, that it had infrequently done so in the past, and that it had funding problems with the park project that definitely precluded the possibility of condemnation (Pet. App. A2-A3, A9-A10). Petitioner also conceded that in his discussions with Tucker, the latter did not

say that he was going to condemn petitioner's land. Petitioner testified, however, that he knew that Tucker could have done so (Pet. App. A3-A4).

Relying upon Tucker's testimony concerning his conversation with petitioner, the Tax Court found (Pet. App. A24) that no reasonable man would have concluded on these facts that the State was going to condemn the property. The court of appeals affirmed the Tax Court's ultimate holding that petitioner's dealings with Tucker gave rise to no reasonable inference by petitioner that his land was under threat or imminence of condemnation (Pet. App. A3-A4). It held, however, that petitioner's admission that Tucker said he was not going to condemn petitioner's property was "more than sufficient" to support the Tax Court's ultimate finding (Pet. App. A3-A4).[2] The affirmance of the Tax Court upon this alternative basis does not, as petitioner argues (Pet. 15-16), represent an erosion of the Tax Court's decision. It simply reenforces the Tax Court's ultimate finding with additional record evidence.

Similarly, petitioner's ultimate sale of his property to Gerald Derks, an undisclosed agent of Consumers Power Company, was not motivated by the threat or imminence of condemnation. In late 1964, that company selected a site for a new generator plant which includ-

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[2] Contrary to petitioner's argument (Pet. 22), the reliance by the court of appeals upon his testimonial admission is fully in accord with the case law which requires a reasonable belief that the taxpayer's property was subject to a "threat or imminence" of condemnation. See, *e.g.*, *Maixner* v. *Commissioner, supra; S&B Realty Co.* v. *Commissioner, supra.* The fact that petitioner knew that Tucker could have condemned the property does not objectively support the existence of the "threat or imminence" of condemnation in the face of Tucker's undisputed statement that he would not condemn the property.

ed petitioner's property and hired Gerald Derks to acquire this land, on the condition that Derks purchase the land in his name and not reveal that he represented a principal with condemnation powers. In early December, 1964, Derks met with petitioner, and thereafter petitioner contracted to sell the property to Derks (Pet. App. A12-A14). At that time, petitioner was unaware that Derks' principal was the power company or that it had the power to condemn. Both courts below accepted as credible Derks' testimony that he made no threats to petitioner and that the sale was not coerced or otherwise made under adverse circumstances (Pet. App. A4, A14). Accordingly, there is no basis for petitioner's claim that his property was sold under a threat or imminence of condemnation.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

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Respondent.

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REPLY BRIEF.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF.

Although counsel for the petitioners[1] received no copy of any Order of this Court extending the period provided by Rule 24 of the Rules of the Supreme Court for the filing of a Brief in Opposition, the respondent filed herein on January 9, 1974, more than two weeks after the expiration of the period provided by Rule 24, a "Memorandum for the Respondent in Opposition." The petitioners had filed their Petition for Writ of Certiorari with this Court on October 31, 1973. In his Memorandum, the respondent has woefully misstated both a determinative factual conclusion reached by the Court of Appeals and a most significant element of its Order which reversed the key finding of fact upon which the adverse Tax Court

1. All references to "petitioner" are to Edward Warner, since his wife is a party only by virtue of having filed a joint federal income tax return with Mr. Warner for 1965.

decision was based. Because of such serious misstatements, the filing of this Reply Brief to rebut such misstatements has been made necessary.

In addition, the filing of this Reply Brief has also been necessitated by the Internal Revenue Service having issued after the date of the filing of the Petition herein Rev. Rul. 74-8, I. R. B. 1974-1, 16, which has significantly modified and liberalized Rev. Rul. 58-557, 1958-2 C. B. 402, and Rev. Rul. 63-221, 1963-2 C. B. 332, which are cited in such Petition. For reasons hereinafter discussed, Rev. Rul. 74-8 further underpins the petitioners' position that they are entitled to the nonrecognition treatment provided by Section 1033.

More specifically, in support of his contention that "petitioner could not reasonably have believed that his land was under threat or imminence of condemnation when it was sold in 1965" (Memo. p. 2), the respondent relied almost exclusively upon the following misstatements of the factual situation:

> 1. "T. R. Tucker . . . told petitioner that the state . . . had funding problems with the park project that definitely precluded the possibility of condemnation (Pet. App. A2-A3, A9-A10)." (Memo. p. 2);
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> 2. "Petitioner's admission that Tucker said he was not going to condemn petitioner's property. . . ." (Memo. p. 3);
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> 3. "Tucker's undisputed statement that he would not condemn the property." (Memo, p. 3, n. 2.)

The respondent then set forth this distorted and wholly erroneous interpretation of the holding of the Court of Appeals:

> "It held, however, that petitioner's admission that Tucker said he was not going to condemn petitioner's property was 'more than sufficient' to support the Tax Court's ultimate finding (Pet. App. A3-A4).[2] The affirmance of the Tax Court upon this alternative basis does not, as petitioner argues (Pet. 15-16), represent an erosion of

the Tax Court's decision. It simply reenforces the Tax Court's ultimate finding with additional record evidence." (Memo. p. 3.)

From the foregoing, it is apparent that the respondent failed to comprehend that the Court of Appeals held that the Tax Court's key finding of fact, that Mr. Tucker had told petitioner Edward Warner that condemnation by the state was definitely precluded, was not supported by the record, and thus was erroneous. (Pet. App. A2-A3) The Court of Appeals' holding on this point is clearly and unequivocally stated as follows:

> "The Warners argue that the Tax Court clearly erred in finding that Tucker had told them that condemnation by the State would not occur. In support of its holding, the Tax Court placed prime reliance on the following testimony from Tucker:
>
> Q. Was condemnation mentioned in your negotiations with Mr. Warner?
>
> A. At any time?
>
> Q. Yes.
>
> A. Yes, the subject was brought up by Mr. Warner. We find clients always have an interest in what our inherent powers are and the extreme reluctance of the Department of Conservation and the limited history of condemnation is always brought to the fore at this point. In my twenty-five years with this division it had less than four cases. This is always brought out, and the funding difficulties and situations and limitations on our ability to proceed definitely precluded any possibility of condemnation.
>
> *We must agree that this statement fails to support the findings of the Tax Court.* The Government cites additional testimony of Tucker to the effect that he informed the Warners of funding difficulties in connection with the proposed park, but it cannot seriously be contended that statements of this sort bear more than remotely on the possibility that Tucker discussed his inability to condemn with the Warners. (Pet. App. A2-A3) (Emphasis added.)

That such finding of fact was found to be erroneous cannot be seriously disputed. Thus, since the respondent's arguments in opposition to the granting of the instant Petition for Writ of Certiorari are based entirely upon that finding of fact which was the keystone of the Tax Court decision, but which was found to be erroneous by the Court of Appeals, those arguments must fail.

A great deal of significance should be attributed by this Court to the fact that the respondent did not contest in its Memorandum the petitioners' contention that the Court of Appeals' reversal of that key finding of fact required the reversal of the Tax Court's adverse decision. Rather, the respondent misstated the Court of Appeals' holding on this key finding of fact in order to avoid having to attempt to rebut such contention. The respondent's failure to address himself to this contention should be construed by this Court as an admission that the reversal of this key finding of fact required the reversal of the Tax Court's decision, and that the Court of Appeals' failure to so reverse such decision was erroneous and should be corrected by this Court.

Also in his Memorandum, the respondent characterized as a "factual determination" the conclusion of both Courts below that a threat or imminence of condemnation was not present when the petitioner sold his property. (Memo. p. 1) This, of course, overlooks the fact that such holdings involve the application of provisions of Section 1033 of the Internal Revenue Code of 1954, as amended, to the factual situation as found to exist by the Tax Court, and as corrected by the Court of Appeals. This causes such holdings to constitute the resolution of a question of law, or at the very least, a mixed question of law and fact. As such, those holdings are subject to review free of the restraints of the "clearly erroneous" rule. *Simpson* v. *United States,* 261 F. 2d 497 (7th Cir. 1958); *Chandler* v. *United States,* 226 F. 2d 403 (7th Cir. 1955). Respondent also incorrectly inferred that the petitioner's sale of his property to a third party, Gerald Derks, an agent of Consumer's

Power Company, prevented such sale from having been made pursuant to a threat or imminence of condemnation emanating from T. R. Tucker of the Michigan Department of Conservation. This completely overlooks the fact that the nonrecognition treatment provided by Section 1033 is extended to a taxpayer who is under a threat of imminence of condemnation even though he sells his property to a party other than the one who has created such threat or imminence of condemnation, *S. & B. Realty Co.*, 54 T. C. 863, *acq.* 1970-2 C. B. xxi (1970); *S. H. Kress & Co.*, 40 T. C. 142 (1963).

Of equal importance to the foregoing is the Internal Revenue Service's issuance of Rev. Rul. 74-8, I. R. B. 1974-1, 16, which modified and liberalized Rev. Rul. 58-557 and Rev. Rul. 63-221, both of which are cited in the Petition. Rev. Rul. 74-8 interpreted those two Rev. Ruls. as holding that

> "generally, the threat or imminence of condemnation is considered to exist for purposes of section 1033 of the Code when the property owner is informed, either orally or in writing by a representative of a governmental body or public official authorized to acquire property for public use, that such body or official has decided to acquire his property, and from the information conveyed to him has reasonable grounds to believe that his property will be condemned if a voluntary sale is not arranged."

However, Rev. Rul. 74-8 then greatly liberalized the standard for determining the existence of a threat or imminence of condemnation by holding that where a public utility had not yet obtained the power under state law to condemn property at the time that the taxpayer entered into an agreement to sell his property, the remainder of the factual situation nonetheless made it reasonable for the taxpayer to conclude that his property was subject to a threat or imminence of condemnation, and the nonrecognition provisions of section 1033 were extended to such sale. That Rev. Rul. states:

> "Since there were no reasonable grounds to believe the utility might not obtain the power to condemn the prop-

> erty, the sale was made under threat or imminence of condemnation, notwithstanding that the utility did not yet have the legal power to condemn."

Thus, Rev. Rul. 74-8 evidences a significant shift in emphasis by the Internal Revenue Service. Rather than requiring a showing of reasonable grounds to believe that the utility either had or would obtain the power to condemn as a pre-requisite for nonrecognition treatment under section 1033, the Internal Revenue Service merely established as the standard the negation of reasonable grounds to believe that the utility might *not* obtain the power to condemn.

Applying the holding of Rev. Rul. 74-8 by analogy to the instant case, it is undisputed that the Michigan Department of Conservation did in fact possess the power of condemnation, and the Tax Court's findings of fact, as corrected by the Court of Appeals, established that T. R. Tucker, an official with that Department, did in fact discuss that Department's condemnation powers with Mr. Warner, and did *not* advise him that his property would not be condemned if a voluntary sale was not arranged. In view of the remainder of the factual situation, which is detailed at pages 22 through 27 of the Petition, not only were there no reasonable grounds to believe that the petitioner's property would not be condemned if a voluntary sale were not arranged, but there were in fact reasonable grounds for believing that his property would be condemned if a voluntary sale were not arranged.

In summary, then, Rev. Rul. 74-8 found a threat or imminence of condemnation to be present despite that the "condemning authority" did not in fact have the power of condemnation at the time of the sale of the real estate in question, whereas the Court of Appeals did not find a threat or imminence of condemnation to be present in the instant case, despite the totality of the factual situation, simply because the petitioner was advised that the state "could" condemn his property, rather than that the state "would" condemn his property, in the event

that a voluntary sale were not arranged. This highlights the difference between the standard applied in Rev. Rul. 74-8 and that applied by the Court of Appeals in the instant case to determine the existence of a threat or imminence of condemnation and, in view of the grave financial injury which will otherwise be imposed upon the petitioners, it underscores the need for this Court to grant certiorari to cure the serious error committed by the Court of Appeals and to provide consistency in the application of the provisions of Section 1033 to the petitioners and other taxpayers similarly situated.

CONCLUSION.

For the reasons set forth above, and for the reasons previously set forth in the Petition, the petitioners respectfully renew their prayer that a Writ of Certiorari be granted to review the Order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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